Supreme Court, U.S.
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No. 09-775

Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

MICHAEL BAKER,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent asserts that this Court should deny review in this matter because the decision of the Kentucky Supreme Court is based upon an adequate and independent state law ground. He further asserts that the Kentucky Supreme Court's decision is proper because residency restriction statutes do not accomplish what they are intended to accomplish.

A. The Opinion Of The Kentucky Supreme Court Is Not Based On An Adequate And Independent State Law Ground.

In his response, Respondent asserts the Kentucky Supreme Court's opinion certifying that KRS 17.545 constitutes an *ex post facto* violation when applied to registered sex offenders whose offenses were committed prior to the effective date of the statute "is based upon independent state law grounds that are independent of the federal question presented. . . ." However, a review of the Kentucky Supreme Court opinion shows that the decision is indeed based exclusively on federal law.

In the opinion, the Kentucky Supreme Court noted that both the United States Constitution and Kentucky Constitution contain *ex post facto* prohibitions. However, the court then quoted the *ex post facto* provision of the United States Constitution to set forth the specific prohibition (slip opinion, p. 6). No where in the opinion does the Kentucky Supreme Court set forth the *ex post facto* clause of the Kentucky Constitution, nor does the court explicitly or implicitly state that the *ex post facto* clause of the Kentucky Constitution supports its decision irrespective of the

same prohibition in the United States Constitution.

Further, as Respondent acknowledges, the Kentucky Supreme Court based its entire analysis of the issue on this Court's precedent in *Smith v. Doe*, 528 U.S. 84 (2003). Contrary to Respondent's assertion, the Kentucky Supreme Court did not base its decision on any aspect of state law. Every citation to a Kentucky state case concerning the interpretation of the *ex post facto* clause contained a parenthetical citation to the precedent of this Court.

In *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983), this Court stated as follows:

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

In this case, as in *Long*, the decision of the Kentucky Supreme Court "fairly appears to rest primarily on federal law" and no adequate or independent state law ground for the decision is clear from the face of the opinion.

Petitioner's citation to the decisions of the Kentucky Supreme Court in *Peterson v. Shake*, 120 S.W.3d 707 (Ky. 2003) and *Dickerson v. Commonwealth*, 174 S.W.3d 451 (Ky. 2005), as supportive of his contention that the opinion herein is based on an adequate and

independent state law ground is misplaced. While Petitioner is correct that the Kentucky Supreme Court found the amendments to Kentucky's sex offender registration scheme enacted in 2000 could not be retroactively applied in *Peterson* and *Dickerson*, neither case involved the application of the *ex post facto* clauses in either the United States or Kentucky Constitutions. Rather, those cases involve questions of pure statutory construction.

In its 2000 general session, the Kentucky General Assembly amended KRS 17.510(11) and (12) to provide that failing to comply with sex offender registration requirements or giving false, misleading or incomplete information in registering constituted a Class D felony. *Peterson*, 120 S.W.3d at 708. *See also* 2000 Ky. Acts, Ch. 401, § 16. Previously, these offenses had constituted Class A misdemeanors. *Id.* The amendments became effective on April 11, 2000. *Id.* at 709.

In holding that the amendments could not be applied retroactively, the Kentucky Supreme Court's decision rested entirely upon Section 37 of 2000 Ky. Acts, Ch. 401, which provided that "[t]he provisions of Sections 15 to 30 of this Act shall apply to all persons who, after the effective date of this Act are required under Section 16 of this Act to become registrants, as defined by Section 15 of this Act." The Kentucky Supreme Court found the language of Section 37 unambiguously showed "that the 2000 amendments were only intended to apply to persons who were required to *become* registrants following April 11, 2000." *Id.* (italics original); *Dickerson*, 174 S.W.3d at 459-60 (2000 amendments could not be retroactively applied

to person who became a registrant in 1997 when the 1994 version of the Act was in effect.).

Neither *Peterson* nor *Dickerson* contains any discussion that the retroactive application of the 2000 amendments to KRS 17.510(11) and (12) constitutes an *ex post facto* violation under Section 19(1) of the Kentucky Constitution. The retroactive application of the amendments was prohibited solely on the basis of the language in Section 37 of the act enacting the amendments. Such language is not present in this case, and the Kentucky Supreme Court's decision herein was based solely on the retroactive application of KRS 17.545 being an *ex post facto* violation. In considering the issue, the Kentucky Supreme Court relied exclusively on this Court's precedent and there is no independent and adequate state law ground to support its decision.

B. The Decision Of The Kentucky Supreme Court Conflicts With Decisions Of A United States Court Of Appeals And Other State Supreme Courts

Respondent does not dispute that a conflict exists regarding whether the retroactive application of a sex offender residency restriction statute constitutes an *ex post facto* violation. He cites to *dicta* from this Court's decision in *Smith v. Doe*, 538 U.S. 84 (2003), and posits that this Court has already considered the issue presented. Contrary to respondent's contention, this Court has never considered the question presented in this matter. However, because a split in decisions on this issue from state supreme courts and a United

States Court of Appeals is occurring, this Court should grant certiorari in this matter to resolve the conflict.

Petitioner's citation to *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), is as misplaced as his citation to this Court's *dicta* in *Smith*. *Cutshall* simply did not involve a residency restriction statute such as KRS 17.545. Rather, *Cutshall* considered whether the retroactive application of the Tennessee Sex Offender Registration and Monitoring Act, Tenn. Code § 40-39-101 to -108, violated the *ex post facto* clause. The Sixth Circuit concluded the Act was not punitive, and, therefore, the *ex post facto* clause was not implicated. 193 F.3d at 477.

Finally, petitioner's citation to *Doe v. Schwarzenegger*, 476 F.Supp.2d 1178 (E.D. Cal. 2007), highlights the conflict that exists in considering whether the retroactive application of a sex offender residency restriction violates the *ex post facto* clause. However, the District Court in *Doe* did not address the issue. Its decision that California's Sexual Predator Punishment and Control Act (SPPCA), which restricts lifetime sex registrants from residing "within 2,000 feet of any public or private school, or park where children regularly gather, Cal. Penal Code § 3003.5(b), applied only prospectively was based on the California Penal Code. Specifically, the court relied upon Cal. Penal Code § 3 which states: "No part of [this code] is retroactive, unless expressly so declared." *Id.* at 1181. The District Court concluded there was no express declaration that the SPPCA was to apply retroactively. The court did not, however, undertake any *ex post facto* analysis in reaching its decision.

On February 1, 2010, however, the California

Supreme Court did consider whether the retroactive application of the SPPCA violated the *ex post facto* clause. *In re E.J.*, — Cal.Rptr.3d —, 2010 WL 337150 (Cal. 2010). The California Supreme Court specifically found the residency restriction in Cal. Penal Code § 3003.5(b) did not constitute an impermissible *ex post facto* law because the "new residency restrictions apply to events occurring *after* their effective date. . . ." Slip Op., p. 15. As such, the California Supreme Court concluded the residency restriction did not "additionally punish for the sex offense conviction or convictions that originally gave rise to the parolee's status as a lifetime registrant. . . ." *Id.*

Likewise, KRS 17.545 does not additionally punish registered sex offenders, such as Respondent, for the sex offense conviction which gave rise to his status as a registrant under KRS 17.510. Rather, KRS 17.545 applies to the act of a registered sex offender residing in non-compliant housing after the effective date of that statute. The retroactive application of KRS 17.545's residency restriction to persons required to register for sex offenses committed prior to the effective date of KRS 17.545 does not constitute an *ex post facto* violation, and this Court should grant certiorari in this matter to settle the conflict in decisions considering this issue.

CONCLUSION

For the foregoing reasons, the Commonwealth of Kentucky prays this court to grant the petition for writ of certiorari.

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